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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE FUND FOR ACCURATE AND INFORMED REPRESENTATION, INC., (FAIR) *et al.*,

Appellants,

VS.

SAUL WEPRIN, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM AND/OR DISMISS

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QUESTIONS PRESENTED

1. Whether the three-judge court was correct to apply the settled law of this Court that, in state-enacted legislative redistricting, a population deviation of less than 10% does not establish a *prima facie* case of discrimination under the one person/one vote principle.

2. Whether the evidence before the three-judge court supports that court's finding that Appellants do not lack political power and are not shut out of the political process in New York State and therefore cannot succeed on a political gerrymander claim.

3. Whether the three-judge court was correct to apply the well-established rule that the constitutional protections in redistricting do not extend to communities of interest and political subdivisions.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

APPELLEES' BRIEF IN SUPPORT OF MOTION TO AFFIRM AND/OR DISMISS 3

I. THE THREE-JUDGE COURT CORRECTLY HELD THAT A POPULATION DEVIATION OF LESS THAN 10% DOES NOT ESTABLISH A *PRIMA FACIE* CASE OF DISCRIMINATION UNDER THE ONE PERSON/ONE VOTE PRINCIPLE. 4

II. THE DECISION BELOW REFLECTS A STRAIGHTFORWARD APPLICATION OF *DAVIS V. BANDEMER* TO UNCONTROVERTED PROOF OF PERVASIVE REPUBLICAN INFLUENCE IN NEW YORK STATE'S POLITICAL PROCESS AS A WHOLE. 8

III. APPELLANTS HAVE NO INDEPENDENT VOTE DILUTION CLAIM UNDER THE FIRST AMENDMENT 21

IV. THE STATE PLAN DOES NOT UNREASONABLY SEPARATE COMMUNITIES OF INTEREST, WHICH, IN ANY EVENT, ARE NOT CONSTITUTIONALLY PROTECTED. . . 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Celebrezze, 460 U.S. 780 (1983) 21-22

Badham v. March Fong Eu, 694 F. Supp. 664 (N.D. Cal. 1988) (three-judge court), *aff'd*, 488 U.S. 1024 (1989) 11-12, 15-16, 22

Bandemer v. Davis, 603 F. Supp. 1479 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986) 21

Bd. of Estimate v. Morris, 489 U.S. 688 (1989) 7

Boehmer v. Penn. R.R. Co., 252 U.S. 496 (1920) 4

Branti v. Finkel, 445 U.S. 507 (1980) 23

Brown v. Thomson, 462 U.S. 835 (1983) 4-5

Burdick v. Takushi, ___ U.S. ___, 112 S. Ct. 2059 (1992) 22-23

Chapman v. Meier, 420 U.S. 1 (1975) 6, 26

Clements v. Fashing, 457 U.S. 957 (1982) 26

Connor v. Finch, 431 U.S. 407 (1977) 5-6, 26

Davis v. Bandemer, 478 U.S. 109 (1986) . . . . . passim

Elrod v. Burns, 427 U.S. 347 (1976) 23

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 25

Farnum v. Burns, 561 F. Supp. 83 (D.R.I. 1983) 6

Gaffney v. Cummings, 412 U.S. 735 (1973) 5

Hicks v. Miranda, 422 U.S. 332 (1975) 15

Hodel v. Indiana, 452 U.S. 314 (1981) 25

Karcher v. Daggett, 462 U.S. 725 (1983) 6-7

Mahan v. Howell, 410 U.S. 315 (1973) 6

Mandel v. Bradley, 432 U.S. 173 (1977) 15

Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964) 26

Mirrione v. Anderson, 717 F.2d 743 (2d Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984) 24

Mobile v. Bolden, 446 U.S. 55 (1980) 10-11

New York Dock Co. v. S.S. Poznan, 274 U.S. 117 (1927) 4

Republican Party of Virginia v. Wilder, 774 F. Supp. 400 (W.D. Va. 1991) 22

Reynolds v. Sims, 377 U.S. 533 (1964) 4, 26

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 23

Sincock v. Roman, 233 F. Supp. 615 (D. Del. 1964) 8

Thornburg v. Gingles, 478 U.S. 30 (1986) 17

United Jewish Orgs., Inc. v. Carey, 430 U.S. 144 (1977) 13, 24

Whitcomb v. Chavis, 403 U.S. 124 (1971) 13

White v. Crowell, 434 F. Supp. 1119 (W.D. Tenn. 1977) . 6

White v. Regester, 412 U.S. 755 (1973) 5-6

White v. Weiser, 412 U.S. 783 (1973) 26

William v. Rhodes, 393 U.S. 23 (1968) 22

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amend. I 21-23

U.S. Const. Amend. XIV 5, 7, 21-23

Voting Rights Act, 42 U.S.C. § 1973 (1988) 1, 3, 7, 16, 25

COUNTERSTATEMENT OF THE CASE

Two months before the legislative redistricting plan for the New York State Assembly was enacted into law, Appellants commenced this action seeking, *inter alia*, a declaration that the judiciary, rather than the legislature, draw new Assembly districts, and attacking as unconstitutional a then-extant inchoate legislative proposal for new Assembly districts. Appellees moved to dismiss that complaint for want of a case or controversy. On the return date of the motion, Appellants served an amended complaint raising the same claims of unconstitutionality, but directed at the by then state-enacted plan. The State plan as enacted differed significantly from the inchoate legislative proposal which Appellants had addressed in their original complaint.

In view of the amendment to the complaint, the single district judge sitting at the time permitted Appellees to supplement their original motion to dismiss to address substantive claims as well. At its heart, the amended complaint sought to upset the State-enacted lines on four grounds: (1) one person/one vote; (2) political gerrymander; (3) the Voting Rights Act, 42 U.S.C. § 1973 (1988); and (4) unconstitutional fragmentation of communities. By Order dated May 20, 1992, the single district judge decided the motion to dismiss (Appendix G). He let stand the claims under one person/one vote and the Voting Rights Act but dismissed the political gerrymandering and community fragmentation claims.

The very next day, Appellants filed a second amended complaint. A three-judge court which previously had been convened reviewed the Order of the single district court judge with respect to Appellees' motion to dismiss. By Memorandum and Order dated May 28, 1992 (Appendix E), the three-judge panel upheld the decision of the single district judge as to the one person/one vote and community fragmentation claims, restored the political gerrymandering claim in view of the intervening second amended complaint, but reversed the determination as to the Voting Rights Act claim, which it dismissed with leave to replead. In that same

Memorandum and Order, the three-judge court set a schedule for trial. A third amended complaint followed on June 1, 1992.

In connection with setting the trial schedule, Appellees urged that the trial be deferred until after elections, but Appellants asserted that an actual election would not be necessary as reliance on statistical projections alone would be sufficient to prove their claims. The three-judge court endorsed Appellants' position and set a trial date of June 24, 1992. Pre-trial discovery was had and thereafter the trial was conducted on June 24 and 25, 1992.[1]

Nine witnesses testified for Appellants and nine witnesses testified for Appellees. One hundred seventeen exhibits were introduced into evidence by Appellants, thirty-nine exhibits were introduced into evidence by Appellees and six joint exhibits were received into evidence.[2]

After comprehensive pre-trial and trial review of Appellants' four complaints, and based upon the extensive evidence adduced at trial, the three-judge court concluded that Appellants' case was without merit and entered judgment dismissing Appellants' claims with prejudice (Appendix A). This appeal followed.

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[1] At the court's suggestion, and with the consent of all counsel, the proceeding was converted to a summary trial.

[2] Contrary to Appellants' Statement Of The Case, Appellees' witnesses sharply refuted Appellants' claim that its counterplan "was more compact, provided additional representation for racial and ethnic minorities, and was bereft of any partisan gerrymandering techniques." (App. Brief, p. 5)

APPELLEES' BRIEF IN SUPPORT OF MOTION TO AFFIRM AND/OR DISMISS

Appellees, Saul Weprin, both individually and as Speaker of the Assembly of the State of New York, David Gantt, both individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment ("Task Force"), the Assembly Democratic Members of the Task Force and the Assembly of the State of New York respectfully submit this motion to affirm and/or dismiss.

This case presents no issue requiring Supreme Court review. The decision of the three-judge court, rendered after a trial on the merits, followed, and is consistent with, this Court's precedents in all respects.

The three-judge court applied unambiguous precedent of this Court to hold that an under 10% population deviation in a state-enacted legislative redistricting plan does not violate the one person/one vote rule. The three-judge court also applied the plain instruction of *Davis v. Bandemer*, 478 U.S. 109 (1986) to proof that Appellants are not shut out of the New York State political process and hence concluded that Appellants cannot succeed in a political vote dilution claim. The decision of the three-judge court is consistent also with this Court's teaching that a heightened showing by the challenger is required in political vote dilution cases. And the dismissal of the community fragmentation claim does not depart from established precedent of this Court.[3]

The decision of the three-judge court is not in conflict with any decision of another three-judge court or any Circuit Court of Appeals on the same matter. Nor did the three-judge court decide a federal question in a way that conflicts with a state court of last resort. Nor does this case involve an important or substantial question of federal law which should be settled by this Court. The decision of the three-

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[3] Appellants do not appeal from the three-judge court's dismissal of the Voting Rights Act claim.

judge court rests on findings of fact and this Court's judicial resources should not be exercised to review factual findings. *See New York Dock Co. v. S.S. Poznan,* 274 U.S. 117 (1927); *Boehmer v. Penn. R.R. Co.*, 252 U.S. 496 (1920).

I.

THE THREE-JUDGE COURT CORRECTLY HELD THAT A POPULATION DEVIATION OF LESS THAN 10% DOES NOT ESTABLISH A *PRIMA FACIE* CASE OF DISCRIMINATION UNDER THE ONE PERSON/ONE VOTE PRINCIPLE.

The Constitution does not demand exact numerical equality among districts in state-enacted legislative redistricting plans. *Reynolds v. Sims*, 377 U.S. 533 (1964). Where state-enacted legislative redistricting is involved, uniform precedent of this Court establishes a permissible population deviation of up to 10%.

There is no dispute that the maximum deviation between any two districts in the State's plan is 9.43%, with the largest positive deviation of +5.33% occurring in Richmond County and the largest negative deviation of –4.10% occurring in Kings County.[4] Because the maximum deviation is under 10%, no claim for violation of the one person/one vote principle can be stated.

This Court flatly stated the rule in *Brown v. Thomson*, 462 U.S. 835 (1983):

> [W]e have held that "*minor deviations* from mathematical equality among state legislative districts *are insufficient to make out a prima facie case of invidious discrimination* under the Fourteenth Amendment *so as to require justification by the State*." [*Gaffney v. Cummings*, 412 U.S.] at 745, 93 S.Ct., at 2327. Our decisions have established, as

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[4] It is also undisputed that the average deviation from perfect equality for all the plan's districts is only 2.14% and that the median deviation for all the plan's districts is 0.2%.

> a general matter, that *an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations*. See, *e.g.*, *Connor v. Finch*, 431 U.S. 407, 418, 97 S.Ct. 1828, 1835, 52 L.Ed.2d 465 (1977); *White v. Regester*, 412 U.S. 755, 764, 93 S.Ct. 2332, 2338, 37 L.Ed.2d 314 (1973).

Id. at 842-843 (emphasis added).

The principle is clear: Deviations under 10% are minor, do not make out a *prima facie* case, and need not be justified by the State. As it is below 10%, the 9.43% deviation in the State plan is "minor" as a matter of law and "insufficient to make out a prima facie case" of violation of the one person/one vote mandate.

Even before *Brown*, this Court held in *Gaffney v. Cummings*, 412 U.S. 735 (1973), that overall and average deviations strikingly close to those in the State's plan here did not make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment. As this Court stated in *Gaffney*:

> [T]he proof at trial demonstrated that the House districts under the State Apportionment Board's plan varied in population from one another by a *maximum* of only about 8% and that the average deviation from the ideal House district was only about 2%. . . . On such a showing, we are quite sure that a prima facie case of invidious discrimination under the Fourteenth Amendment was not made-out.

Id. at 751 (emphasis in original). *See also White v. Regester*, 412 U.S. 755, 763 (1973) ("Insofar as the District Court's judgment rested on the conclusion that the population differential of 9.9 percent from the ideal district . . . made out a prima facie equal protection violation under the Fourteenth Amendment, absent special justification, the court was in error."); *Connor v. Finch*, 431 U.S. 407, 418 (1977) ("The maximum population deviations . . . in the . . . districts

can hardly be characterized as *de minimis*; they substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments.")[5]

Moreover, although justification by the State is not required, the record amply demonstrates that the population deviations in the State plan "may reasonably be said to advance [a] rational state policy", *Mahan v. Howell*, 410 U.S. 315, 328 (1973), and hence meet the standard for justification. This Court has identified a number of legitimate state legislative policies which suffice to justify deviation from the equal population standard.

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, *respecting municipal boundaries*, preserving the cores of prior

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[5] Appellants' own authorities confirm the principle. Contrary to Appellants' contention, in *Farnum v. Burns*, 561 F. Supp. 83 (D.R.I. 1983) (three-judge court) the court held "when such a [state redistricting] plan has a total deviation of less than ten percent, it does not violate the one-person, one-vote principle merely because a population window was used in developing that plan." *Id.* at 93.

Similarly, *White v. Crowell*, 434 F. Supp. 1119 (W.D. Tenn. 1977) (three-judge court) turned on the fact that the legislature adopted, and later amended, what had been a court drawn plan as to which strict mathematical equality is required. *Connor v. Finch*, *supra* at 417. The *Crowell* court observed:

> This court concludes that the relatively small deviations resulting from this 1976 partial reapportionment at issue here would pass constitutional muster if they had been a result of the general reapportionment enacted by the Tennessee legislature in 1973 following the ruling by the three-judge court.... Certainly such deviations would have been within the tolerances indicated by the foregoing decisions [of *White v. Regester*, *Chapman v. Meier*, 420 U.S. 1 (1975) and *Connor v. Finch*].

Id. at 1123.

districts, and avoiding contests between incumbent Representatives.

Karcher v. Daggett, 462 U.S. 725, 740 (1983) (emphasis added).[6]

The evidence established that the negative deviation of –4.10% in Kings County is a direct consequence of the creation of an additional minority district in that county in compliance with the Voting Rights Act as well as the desire to "respect municipal boundaries" by keeping all Kings County Assembly Districts wholly within the boundaries of Kings County. The evidence also established that the positive deviation of +5.33% in Richmond County resulted from a legislative policy choice to keep the County of Richmond whole, and not break its county boundary line in the creation of Assembly Districts.[7]

Because the deviation was justified by judicially recognized legitimate State policies, the record fully supports a finding that the State plan does not violate the one person/one vote strictures of the Fourteenth Amendment by reason of population deviations, even were justification required.

In sum, the three-judge court did not misconstrue this Court's one person/one vote mandate. Appellants' proposition is wrong. In state-enacted legislative redistricting, the one person/one vote rule does not command absolute arithmetic equality. It does not, as Appellants claim, demand that

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[6] It is noteworthy that these objectives were identified as prevailing in the context of *Congressional* redistricting where virtual mathematical equality among districts is required. *Karcher*, *supra*.

[7] The reasons underlying the State's choice not to splinter Richmond County (Staten Island) are uncontroverted: Richmond County is an island, with a unique culture, whose citizenry has called for secession from the City of New York in the wake of this Court's decision in *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

"every deviation from population equality must advance a rational state interest, be consistently applied and be free of taint from discrimination" (App. Brief at p. 7). Appellants' contention falls under the weight of this Court's clear precedent which allow a leeway of up to 10% among state-enacted legislative districts.[8]

II.

THE DECISION BELOW REFLECTS A STRAIGHT-FORWARD APPLICATION OF *DAVIS V. BANDEMER* TO UNCONTROVERTED PROOF OF PERVASIVE REPUBLICAN INFLUENCE IN NEW YORK STATE'S POLITICAL PROCESS AS A WHOLE.

The three-judge court held that Appellants' claim of political vote dilution failed because Appellants could not demonstrate that they suffer consistent degradation or lack of influence in New York State's political process. The trial court correctly focused its inquiry on whether Appellants, New York State Republicans, lack political power and are shut out of the New York political process. The record amply supports the trial court's conclusion that Appellants' "evidence, even when considered in its most persuasive light, falls short of proving that the Assembly apportionment plan deprives Republicans of an opportunity to 'influence [New York State's] political process as a whole.'" (Appendix at pp. 14a-15a; citation omitted).

In the seminal case of *Davis v. Bandemer*, 478 U.S. 109 (1986) this Court articulated the essential prerequisite to a successful challenge of political vote dilution:

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[8] Appellants' argument that one person/one vote is violated because a plan could be created with a lesser deviation rests on a discredited premise. To pass legal muster, an apportionment plan need not be the best plan possible; it need only be constitutional. *Sincock v. Roman*, 233 F. Supp. 615, 619 (D. Del. 1964).

> [U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.

Id. at 132.

The common thread running through vote dilution claims, racial and political, is the critical showing that the challenger "had essentially been shut out of the political process." *Id.* at 139. This is made abundantly clear in the *Bandemer* decision itself:

> In the individual multimember district cases, we have found *equal protection violations only where* a history of disproportionate results appeared in conjunction with *strong indicia of lack of political power and the denial of fair representation.* See *supra*, at 2809. In those cases, the racial *minorities asserting the successful equal protection claims had essentially been shut out of the political process.* In the statewide political gerrymandering context, these prior cases lead to the analogous conclusion that equal protection violations may be found only where a history (actual or projected) of disproportionate results appears in conjunction with similar indicia.

Id.

* * *

> [A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause. See *Mobile v. Bolden*, 446 U.S. at 111, n.7, 100 S.Ct., at 1523, n.7 (Marshall, J., dissenting).

Id. at 132.

Footnote 7 to Justice Marshall's dissent in *Mobile v. Bolden*, 446 U.S. 55 (1980), to which this Court in *Bandemer* directs attention, sounds the *Bandemer* theme that the *sine qua non* to a political gerrymandering cause of action is the existence of significant discrimination against the plaintiff group throughout the political system. Footnote 7 to Justice Marshall's dissent in *Mobile* states:

> When all that is proved is mere lack of success at the polls, the Court will not presume that members of a political minority have suffered an impermissible dilution of political power. Rather, it is assumed that these *persons have means available to them through which they can have some effect on governmental decisionmaking. For example, many of these persons might belong to a variety of other political, social, and economic groups that have some impact on officials.* In the absence of evidence to the contrary, it may be assumed that officials will not be improperly influenced by such factors as the race or place of residence of persons seeking governmental action. Furthermore, political factions out of office often serve as watchdogs on the performance of the government, bind together into coalitions having enhanced influence, and have the respectability necessary to affect public policy.
>
> *Unconstitutional vote dilution occurs only when a discrete political minority whose voting strength is diminished by a districting scheme proves that historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy* . . . . In these circumstances, the only means of breaking down the barriers encasing the political arena is to structure the electoral districting so that the minority has a fair opportunity to elect candidates of its choice.
>
> The test for unconstitutional vote dilution, then, looks only to the discriminatory effects of the

> *combination of an electoral structure and historical and social factors.* At the same time, it requires electoral minorities to prove far more than mere lack of success at the polls.

Id. at 111-112 n.7 (emphasis added; citations omitted).

Appellants offered no proof that historical and social factors render Republicans incapable of affecting governmental decisionmaking. In point of fact, the evidence demonstrated the reverse: that far from lacking political power (as did racial minorities) Appellant Republicans exert substantial influence in the political process and suffer no discrimination or disadvantage in the political process as a whole. Republicans in New York have not suffered either the history or present-day reality of discrimination that burdens racial minorities when it comes to participating in the political process on an equal basis with whites. Unlike membership in a racial group, individuals voluntarily choose to affiliate with a political party. By persuasion, organizational efforts, and success in high visibility campaigns, a political party can expand its ranks over time. Unlike racial minorities, the Republican party has not experienced a history of discrimination that has depressed its socioeconomic standing. A group's socioeconomic position is obviously related to its ability to command the political resources needed to compete in the political arena and to impact officials. In contrast to minority racial groups, Republicans, in fact, tend to be more affluent and better educated than their Democratic rivals.

Further, the record is uncontroverted that:

1. Republicans can freely slate and nominate candidates for public office (***Bandemer***, *supra*, at 133).

2. Republicans can freely register to vote (*id.*).

3. Republicans can freely vote (*id.*).

4. Republicans freely organize, fundraise and campaign (*see*, ***Badham v. March Fong Eu***, 694 F. Supp. 664, 670 [N.D. Cal. 1988] [three-judge court], *aff'd*, 488 U.S. 1024 [1989]).

5. Republicans are free to speak out on issues of public concern (*Badham*, *supra*, at 670).

6. In the State of New York, Republicans hold major elective political offices, including United States Senator, the State Comptroller, 35 out of 61 State Senate seats (a majority), and 55 out of 150 Assembly seats (a minority of more than 36%). Indeed, the Presidency of the United States is held by a Republican and has been for the last 15 years.[9]

7. Republicans are elected and/or appointed to courts, commissions and other government jobs and offices.

8. Republicans receive public services as much or more than other political elements in the society.

9. Republicans are not disadvantaged socially, educationally or economically.

Moreover, apart from the evidence in the record, this Court has instructed in *Bandemer* that Republican influence in the process is presumed. Republican voters whose candidates lose, nevertheless are presumed to have the power to influence the political process representatively through the winning candidate whom such voters are deemed "to have as much opportunity to influence . . . as other voters in the district." *Bandemer*, *supra*, at 132. Only had Appellants proved, which they did not, "that the candidate[s] elected will *entirely ignore* the interests" of Republicans voting for the losing candidate (*Bandemer*, *supra*, at 132; emphasis added)

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[9] A Republican Administration has thus been in charge of running the country for the past 15 years, with all that portends with respect to the establishing of policies and programs that affect the running of State governments, including the State of New York.

would the presumption of Republican influence have been vitiated.[10]

What is more, in the instant case, the record established pervasive Republican influence in the redistricting process itself. The record established:

1. As an initial matter, the districts were formulated and proposed to the Legislature by a bi-partisan Task Force, half of whose members were Republican.

2. At the request of Republican party officials, Republican members of the Task Force, and Republican Assembly members, and in response to testimony by individ-

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[10] *Bandemer* states the proposition as follows:

> [T]he power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters. This is true even in a safe district where the losing group loses election after election.

Bandemer, *supra*, at 132.

Further, even had Appellants shown Democratic Assemblymen to be unresponsive to their Republican constituents, which they did not, Republicans nonetheless are not shut out of the process as there are other Assemblymen who are Republican. The partisan interests of Republican voters whose candidates lose are, in any event, represented in the Assembly by the Republican Assemblymen from other districts. *See United Jewish Orgs., Inc. v. Carey*, 430 U.S. 144, 166 n.24 (1977) ("[t]he effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts in the rest of the county."). *See also Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971) ("[W]e have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year.").

ual Republicans and Republican groups, the Task Force modified its proposal to accommodate specific Republican concerns and interests.

3. Senate Republicans, including the Senate Republican Majority Leader himself, and the Republican Co-chairman of the Task Force, were involved in, and directly influenced, the development of the new Assembly districts.

4. The Task Force proposal was enacted into law when it passed both the Republican-controlled State Senate and the Democratic-controlled Assembly.

5. In the final legislative vote with respect to the plan, 58 out of 89 Republican legislators voting, voted in favor.

Thus, the record established that neither the political process as a whole nor the redistricting process in particular are controlled by one party (as it was in *Bandemer*) but that both are a bi-partisan effort. For this reason alone, the court below soundly concluded that Appellants could not meet their burden of proving that Republicans lack political power, and thus failed to sustain their challenge of political vote dilution under *Bandemer*. As the three-judge court held:

> The fatal flaw in plaintiffs' case is the simple fact that the New York State Senate is an integral component of the state's legislature, and that Republicans hold a majority of the Senate seats. It may not sensibly be denied that a political party controlling the Senate is able to influence legislation. After all, no legislation becomes law without the approval of the Senate. Thus, a party that plays an active role in the Senate therefore plays an active role in the state political process. These undeniable facts are critical when a political party claiming to be gerrymandered out of the state's political process must show that it has been shut-out of the process "as a whole." *Bandemer*, 478 U.S. at 132.

(Appendix at p. 15a).

Like the opinion below, the leading post-*Bandemer* case of *Badham v. March Fong Eu*, *supra*, rejecting a claim of political vote dilution, turned precisely on the Republican challengers' inability to show systemwide discrimination in the political process.[11] *Badham* dismissed on the pleading (as amended), without leave to further replead, a political gerrymandering claim by the Republican party because the facts demonstrated that "California Republicans represent so potent a political force that it is unnecessary for the judiciary to intervene, as [it] would be constrained to do to protect the trampled rights of a disadvantaged political or racial minority." *Badham*, *supra*, 694 F. Supp. at 672.[12]

What was said in *Badham* about the California Republicans, equally true about the New York Republicans, "convinced [the *Badham* court] that there is no credible way in which plaintiffs [can] . . . state a claim under *Davis v. Bandemer*." *Badham*, *supra* at 673.

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[11] This court's affirmance of *Badham* constitutes a disposition on the merits precedentially binding with respect to the facts and precise issues affirmed there. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

[12] As the *Badham* court noted:

> Chief among our observations is our undisputed knowledge that California Republicans still hold 40% of the congressional seats, a sizeable bloc that is far more than mere token representation. It simply would be ludicrous for plaintiffs to allege that their interests are being "entirely ignore[d]" in Congress when they have such a large contingent of representatives who share those interests. We also note that California has a Republican governor, and one of its two senators is a Republican. Given also that a recent former Republican governor of California has for seven years been President of the United States, we see the fulcrum of political power to be such as to belie any attempt of plaintiffs to claim that they are bereft of the ability to exercise potent power in "the political process as a whole" because of the paralysis of an unfair gerrymander.

Id.

> A quick comparison with the facts of the racial gerrymandering cases on which *Bandemer* was based demonstrates the distance of the Republicans from alleging a claim. For example, in *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982), Blacks constituted 38% of the voters in Burke County Georgia, but had never won a single seat. In *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), Blacks constituted "about one-third of the electorate" but had never won a single seat. In cases under the Voting Rights Act, the Court has emphasized that "minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process." *Thornburg v. Gingles*, 478 U.S. 30, 45, 106 S.Ct. 2752, 2764, 92 L.Ed.2d 25 (1986). Republicans in California cannot claim to have been treated as political pariahs; they have been a formidable, and sometimes dominant, force. On this point, we agree with the defendants that "even the bounds of normal political exaggeration are exceeded when the Republicans of California attempt to suggest that their political role can even be spoken of in the same breath as that of the Blacks of Burke County, Georgia and Mobile, Alabama."

Id. at 673.

Bandemer and *Badham* firmly establish that without a history or present day reality of discrimination against New York Republicans with respect to participating in the political process, such as that which burdens racial minorities, there can be no finding of political gerrymander. What Appellants seek to do here is to equate the status of the Republicans in New York with that of disadvantaged racial minorities so as to entitle Republicans to the same special electoral remediation that the law demands for minorities under the Voting Rights Act. On the facts here, neither any statute, nor any case law, nor the Constitution, requires that districts be

affirmatively drawn to enable Republicans to elect candidates of their choice as is true with respect to racial minorities. *Compare Davis v. Bandemer*, *supra*, with *Thornburg v. Gingles*, 478 U.S. 30 (1986), issued on the same day.[13]

At bottom, Appellants' grievance cannot be over Republican influence in the process. Appellants real complaint is about the manner in which Republican elected legislators represented their fellow Republicans in the redistricting process. Such a political division within Republican ranks may be redressable at the polls, but is not justiciable in the courts.

Lack of influence on the political process is but one part of a two-pronged effects test that Appellants were required to meet under *Bandemer*. ("[W]e have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation." *Bandemer*, *supra* at 139.) While the trial court found dispositive Appellants' inability to demonstrate lack of political power, the record also established that Appellants were unable to meet the other prong of the *Bandemer* effects

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[13] Because racial minorities historically have been shut out of the process while political minorities may not have been, racial and political vote dilution claims and rights are not entirely identical. (*I.e.* in contradistinction to political vote dilution claims, there is no intent requirement in racial vote dilution claims.) Hence, Appellants' attempt to buttress their political vote dilution argument with references to Mayor Dinkins and the rights of Afro-American voters (App. Brief, p. 14) is fundamentally flawed and disregards the differing jurisprudence governing the two classes of rights.

test, namely a "history (actual or projected) of disproportionate [election] results." *Id.*[14]

While proportionality is not affirmatively required in order to pass constitutional muster, (*Bandemer* at 130-133, 139) no claim for political gerrymandering can survive in the absence of a showing of disproportionality. *Bandemer* demands, as a threshold matter, a "history (actual or projected) of disproportionate results." *Id.* at 139.

Appellees' expert witnesses, Dr. Allan Lichtman[15]

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[14] The elements of a political vote dilution claim are proof of "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Bandemer*, *supra* at 127.

Because this Court recognized, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended," (*id.* at 129) and in order to shorten the trial, Appellees stipulated to the intent prong of the *Bandemer* test *for the purpose of the political gerrymandering claim only*. The Stipulation of June 22, 1992 reads, in pertinent part, as follows: "The Assembly Defendants agree to admit to the intent prong of the *Davis v. Bandemer* test and stipulate that the plaintiffs need not prove intent in order to prevail on their political gerrymandering claim."

This admission was not intended to apply to, and does not extend to, Appellants' other legal theories, as Appellants would have this Court believe. *See* App. Brief, Point D, p. 10.

[15] Professor of History, American University. Dr. Lichtman's scholarly publications include: *Ecological Inference* (with Laura Irwin Langbein, Sage Series in Quantitative Applications in the Social Sciences, 1978); "Executive Enforcement of Voting Rights, 1957-60," in Terrence Goggin and John Seidel, eds., *Politics American Style* (1971); "Discriminatory Election Systems and the Political Cohesion Doctrine," *National Law Journal* (with Gerald Herbert, Oct. 5, 1987); "Regression vs. Homogeneous Units: A Specification Analysis," *Social Science History* (Winter 1978). Dr. Lichtman also has served as an expert witness on quantitative analysis, political systems, and

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and Dr. Richard Niemi,[16] two renowned scholars in the redistricting field, using sophisticated statistical techniques, found an insignificant disparity between the percentage of

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[15](...continued)
political history for the United States Department of Justice and in voting rights cases throughout the United States including, Mississippi, Florida, South Carolina, Illinois, North Carolina, Virginia, Maryland, Texas and Connecticut.

[16] Professor of Political Science and Former Chairman of the Department of Political Science, University of Rochester. Dr. Niemi is an Editorial Board member of the Journal of Theoretical Politics and of the Legislative Studies Quarterly. Among his numerous scholarly publications are the following: *Classics in Voting Behavior*, (editor and contributor with Herbert F. Weisberg), Washington, D.C., CQ Press, forthcoming, 1992; "The Persistence of Partisan Redistricting Effects in Congressional Elections in the 1970s and 1980s" (with Laura Winsky), *Journal of Politics*, 1992, 54:565-572; "The Nature and Measure of Partisanship" (with David Reed and Herbert F .Weisberg), *Political Behavior*, 1991, 13:213-221; "Bias and Responsiveness in State Legislative Districting" (with Simon Jackman), *Legislative Studies Quarterly*, 1991, 16:183-202; "Partisanship and Group Support, 1952-1988" (with Harold W. Stanley), *American Politics Quarterly*, 1991, 19:189-210; "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering" (with Bernard Grofman, Carl Carlucci, and Thomas Hofeller), *Journal of Politics*, 1990, 52:1155-1181; "The Swing Ratio as a Measure of Partisan Gerrymandering," in Bernard Grofman, ed., *Toward Fair and Effective Representation*, New York: Agathon, 1990; "Majority-Win Percentages: An Approach to the Votes-Seats Relationship in Light of *Davis v. Bandemer*" (with Stephen G. Wright) in Bernard Grofman, ed., *Toward Fair and Effective Representation*, New York: Agathon, 1990; "Partisanship and Group Support over Time: A Multivariate Analysis" (with Harold W. Stanley and William T. Bianco), *American Political Science Review*, 1986, 80:969-976. Expanded version in L. Sandy Maisel, ed., *Encyclopedia of American Political Parties and Elections*, New York: Garland, 1991; "The Effects of Districting on Trade-Offs Among Party Competition, Electoral Responsiveness and The Seats-Votes Relationship," in Bernard Grofman, et al., *Representation and Redistricting Issues*, Lexington, MA: Lexington Books, 1982.

Republican votes cast and the percentage of seats won and that there was no consistent evidence of Democratic bias in the State plan. Dr. Niemi further found, based on a seats-to-votes analysis, that the newly created lines are less favorable to Democrats than the 1982 district lines. Moreover, Dr. Lichtman specifically addressed, and discredited, the analytical underpinnings of Appellants' expert Dr. Gary King.

Important in this regard is the political science truism that in non-proportional representation systems (*e.g.* single member winner-take-all districts), a party winning a majority of the votes almost always wins a larger proportion of the seats. This Court recognized the premise in *Bandemer*:

> The typical election for legislative seats in the United States is conducted in described geographical districts, with the candidate receiving the most votes in each district winning the seat allocated to that district. If all or most of the districts are competitive -- defined by the District Court in this case as districts in which the anticipated split in the party vote is within the range of 45% to 55% -- even a narrow state-wide preference for either party would produce an overwhelming majority for the winning party in the state legislature. This consequence, however, is inherent in winner-take-all, district-based elections, and we cannot hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates.

Id. at 130.

* * *

> District-based elections hardly ever produce a perfect fit between votes and representation.

Id. at 133.

In short, Appellants did not meet their burden of proving disproportionality, as they were required to do. Hence, they also fail the first prong of the *Bandemer* effects test.[17]

III.

APPELLANTS HAVE NO INDEPENDENT VOTE DILUTION CLAIM UNDER THE FIRST AMENDMENT.

Because Appellants' political vote dilution claim cannot pass muster under the Fourteenth Amendment *Davis v. Bandemer* standard under which it must be tested, Appellants attempt to recast their challenge as a First Amendment freedom of association case to be governed by the First Amendment's "strict scrutiny" standard. However, an independent political vote dilution claim under the First Amendment does not lie.

The identical First Amendment claim, relying on the identical ballot access cases of *Anderson v. Celebrezze*, 460

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[17] Appellants argue at length that this case is factually different from *Bandemer* (App. Brief, pp. 16-17). Appellees agree. The findings in *Bandemer* were far more egregious than Appellants assert here. (*E.g.*, the districting process was completely under the control of Republicans; there were no public hearings on the proposed plans; the majority party informed Democratic legislators that minority party input in the redistricting would not be given any weight. *See generally Bandemer v. Davis*, 603 F. Supp. 1479, 1483-1484 [S.D. Ind. 1984], *rev'd*, 478 U.S. 109 [1986].) Nonetheless, this Court rejected the district court's view that judicial intervention was warranted under the *Bandemer* facts. 478 U.S. at 133-134. The undisputable facts in this case are contrary to virtually all of the *Bandemer* district court findings. Since this Court held the *Bandemer* findings insufficient as a matter of law, *a fortiori*, the facts of this case do not permit a finding of political gerrymandering.

U.S. 780 (1983), and *William v. Rhodes*, 393 U.S. 23 (1968)[18] was made and rejected in *Badham*, *supra*. The *Badham* court found that those cases did not support the Republicans' claim that their First Amendment right of association was violated because the Republicans were not prevented from fielding candidates or from voting for the candidate of their choice. 694 F. Supp. at 675. The same is true in the instant case. The Republicans are free to field any candidate they wish, and Republican voters can vote for the candidate of their choice.

In addition, the ballot access cases did not arise in the context of redistricting. This Court has cautioned that standards are different in the context of a redistricting. *See, e.g., Bandemer, supra* at 134 n.14 ("The requirement of a threshold showing is derived from the peculiar characteristics of these political gerrymandering claims. We do not contemplate that a similar requirement would apply to our Equal Protection cases outside of this particular context.") *Accord Republican Party of Virginia v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991).

Appellants have it upside down. Political vote dilution claims must be tested against the "heightened showing" standard imposed on Appellant challengers under *Bandemer*, not a strict scrutiny burden imposed on the State. This Court's recent pronouncement, rejecting First and Fourteenth Amendment challenges to Hawaii's prohibition on write-in voting, further demonstrates that Appellants' claim is not governed by a First Amendment strict scrutiny standard:

> Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right

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[18] *Anderson v. Celebrezze*, *supra* and *William v. Rhodes*, *supra*, struck election rules that burdened independent and third party candidates in obtaining a place on the ballot.

> .to vote must be subject to strict scrutiny. Our cases do not so hold.

Burdick v. Takushi, ___ U.S. ___, 112 S. Ct. 2059, 2062-2063 (1992).

Finally, this Court's patronage employment cases do not extend the First Amendment freedom of association protections to positions held by individual legislators in the political arena. Rather, this Court's three decisions in the area -- *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) -- make clear that the First Amendment protections afforded by these political patronage cases apply only to nonpolicy-making governmental employees, not to quintessential policy makers such as legislators. *Elrod, supra* at 367-368; *Branti, supra* at 518; *Rutan, supra* at 2735 n. 5.

Accordingly, Appellants have no independent viable First Amendment claim and the strict scrutiny test is inapplicable to this case. At its heart, Appellants' First Amendment claim is a vote dilution claim resonating *Bandemer* Fourteenth Amendment themes. As Appellants' purported First Amendment argument states:

> When voters are identified on the basis of party affiliation and are relegated to a district specifically *designed to eliminate their ability to affect the outcome of an election*, the denial is not one of the "most effective" speech, but an elimination of the constitutional *right to participate in the electoral process*.

(App. Brief at p. 22; emphasis added). Having failed *Bandemer*, Appellants' claim cannot be resurrected in a different disguise.

IV.

THE STATE PLAN DOES NOT UNREASONABLY SEPARATE COMMUNITIES OF INTEREST, WHICH, IN ANY EVENT, ARE NOT CONSTITUTIONALLY PROTECTED.

Appellants concede that they do not appeal the ruling below that under *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977) and *Mirrione v. Anderson*, 717 F.2d 743 (2d Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984) cultural communities or political subdivisions such as towns or unincorporated communities are not entitled to protection from being divided or made part of other districts (Appendix, p. 70a). As Appellants acknowledge, "Appellants do not argue that any particular neighborhood, city, town, geographic, or interest community is entitled to be grouped together as a single election unit." (App. Brief, p. 26).

Nonetheless they argue to this Court "that the individual right of voters and citizens in these communities are debased by their needless fragmentation and division between Assembly districts." (App. Brief, p. 26).

The individual rights of voters and citizens in the communities are one and the same as rights of communities. Communities as such do not vote. Voting is an act of the citizens in the community. Since Appellants' argument rests on the rights of "voters and citizens in . . . communities," this claim of Appellants' is a distinction without a difference and cannot survive in the face of *United Jewish Organizations, Inc. v. Carey*, *supra* and *Mirrione*, *supra*.

Building on their faulty premise, Appellants go on to assert that a rational relationship test should be applied:

> If there is any legitimate or rational state policy which justifies the bizarre, crazy-quilt fracturing of various geographic, ethnic and political communities in the Assembly plan, this particular [communi-

> ty of interest] argument would fail. Appellants assert that no such legitimate rationale exists.

(App. Brief at p. 26).

Even *assuming arguendo* that such a claim based upon the alleged "crazy-quilt" of the shapes of the districts could be stated, it falls under the overwhelming evidence adduced at trial of the many rational state purposes underlying the district configurations. As was demonstrated at trial, principal among the rational State policies reflected in the plan was the constitutional imperative of the Voting Rights Act which, by its very nature, produces oddly shaped districts.[19] In addition, compliance with the one person/one vote rule, and with New York State Constitutional requirements such as observance of county lines, and complex block-on-border and town-on-border rules, account for irregular shaping.

The law is clear that when a statute does not use a classification based on a suspect criterion such as race, nationality, alienage, or gender, the law will not be found to violate the Equal Protection Clause unless it has no reasonable or rational basis. *See, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983); *Hodel v. Indiana*, 452 U.S. 314, 331 (1981).

As the State plan utilizes no suspect classification and is rationally based, it does not violate the Equal Protection Clause.

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[19] As previously noted, Appellants do not appeal the determination of the three-judge court that the State plan complies with Section 2 of the Voting Rights Act, a challenge they mounted below.

CONCLUSION

Given this Court's consistent declaration that "legislative reapportionment is primarily a matter for legislative consideration and determination . . ." *Reynolds v. Sims*, *supra*, 377 U.S. at 586; *Connor v. Finch*, *supra*, 431 U.S. at 414; *Chapman v. Meier*, *supra*, 420 U.S. at 27; *White v. Weiser*, 412 U.S. 783, 794-95 (1973); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964), and given the deference that a state redistricting law is accorded as a constitutionally compliant enactment, *Clements v. Fashing*, 457 U.S. 957, 962-63 (1982), and for all of the reasons described above, it is respectfully submitted that the appeal should be dismissed, or, in the alternative, that the decision of the three-judge court should be affirmed.

Respectfully submitted,

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